Abdul Jalil bin Rashid v Mamat bin Talib, Timbalan Ketua Polis Johor & Anor

HIGH COURT(KUALA LUMPUR) — SUIT NO S2-23-54 OF 1993
KAMALANATHAN RATNAM J
11 JUNE 1999

Administrative Law *— Rights and liabilities of public servants — Dismissal of public servant — Failure to provide notes of proceedings — Failure to record a finding of guilt — Whether dismissal lawful*

The plaintiff was a Police Constable in the Royal Malaysian Police Force. He was called upon to attend orderly room proceedings on 7 June 1990 to charges under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the regulations'). The plaintiff was subsequently dismissed. The plaintiff prayed for a declaration that his dismissal was unlawful, that an account be taken of all the salaries, allowances and emoluments due to him from the date of his dismissal and that the same be paid to him and that he be reinstated in service. The plaintiff argued: (i) there was non supply of the notes of proceedings of the enquiry on 7 June 1990; and (ii) there was failure to record a finding of guilt as required by rr 6(2)(c) and 6(6) of the regulations. The defence argued that since the plaintiff was given an opportunity to plead in mitigation, the non-recording of the finding of guilt is merely directory as it is purely procedural.

Held, allowing the application:

(1) Although the plaintiff ought to have taken out a summons to seek discovery and to inspect the notes of evidence of the disciplinary proceedings, the non-supplying of the notes of proceedings goes to the validity of the decision making process of the orderly room proceedings against the plaintiff held on 7 June 1990 (see p 602E–I).

(2) The regulations, especially regs 6(2)(c) and 6(6) are mandatory provisions which require the adjudicating authority to record its findings and that if the finding is one of guilty, the officer can then plead in mitigation (see p 603E). The failure to record the finding of guilt means that it is possible the plaintiff might not have been told that he had been found guilty because only after the recording of the finding of guilt should the officer be invited to mitigate. The mitigation therefore was not in accordance with the provision of reg 6(6) of the regulations and this clearly has affected the validity of the decision making process (see p 604E–F); *Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor* [1999] 5 MLJ 222 distinguished.

[Bahasa Malaysia summary

Plaintif merupakan seorang Konstabel Polis di dalam Pasukan Polis di-Raja Malaysia. Beliau telah dipanggil untuk menghadirkan diri ke

prosiding bilik (orderly room proceedings) pada 7 Jun 1990 terhadap pertuduhan di bawah Peraturan (Kelakuan dan Disiplin) (Pegawai Polis Rendah dan Konstabel) Polis 1970 ('peraturan tersebut'). Plaintif seterusnya telah diberhentikan. Plaintif merayu untuk suatu deklarasi bahawa pemberhentian tersebut adalah tidak sah, bahawa suatu akaun diambil ke atas semua gaji, elaun dan emolumen beliau yang tertunggak kepadanya daripada tarikh beliau diberhentikan dan bahawa yang sama dibayar kepada beliau dan bahawa beliau dikembalikan jawatan di dalam perkhidmatan. Plaintif telah menghujahkan: (i) tidak terdapat bekalan nota prosiding-prosiding siasatan pada 7 Jun 1990; dan (ii) terdapat kegagalan untuk merekodkan penemuan kesalahan seperti yang diperuntukkan oleh peraturan 6(2)(c) dan 6(6) peraturan tersebut. Pihak pembangkang telah menghujahkan bahawa memandangkan plaintif telah diberi peluang untuk membuat rayuan di dalam mitigasi, ketiadaan nota-nota penemuan kesalahan hanyalah bersifat panduan kerana ia adalah bersifat prosedural sepenuhnya.

Diputuskan, membenarkan permohonan tersebut:

(1) Walaupun plaintif sepatutnya mengeluarkan suatu saman untuk memohon suatu penemuan dan untuk memeriksa nota-nota keterangan prosiding-prosiding tatatertib tersebut, nota-nota prosiding-prosiding yang tidak dibekalkan tersebut membawa kesan kepada kesahan proses membuat keputusan prosiding bilik plaintif pada 7 Jun 1990 (lihat ms 602E–I).

(2) Peraturan-peraturan tersebut terutamanya peraturan 6(2)(c) dan 6(6) merupakan peruntukan mandatori yang menghendaki pihak berkuasa yang menghukum untuk merekodkan penemuan-penemuan mereka dan jika penemuan-penemuan tersebut mendapati seorang itu bersalah, pegawai tersebut boleh seterusnya membuat rayuan di dalam mitigasi (lihat ms 603E). Kegagalan untuk merekodkan penemuan-penemuan kesalahan bermaksud adalah berkemungkinan plaintif tidak diberitahu bahawa beliau telah didapati bersalah kerana hanya selepas penemuan kesalahan direkodkan, pegawai tersebut boleh dibenarkan untuk membuat rayuan. Oleh demikian, mitigasi tersebut tidak menurut peruntukan di bawah peraturan 6(6) peraturan tersebut dan ini dengan jelas telah menjejaskan kesahan proses keputusan itu dibuat (lihat ms 604E–F); *Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor* [1999] 5 MLJ 222 dibeza.]

Notes

For cases on rights and liabilities of public servant, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 502–556.

Cases referred to

Ganesan a/l Singaram v Setiausaha Suruhanjaya Pasukan Polis & Ors [1998] 1 MLJ 240 (refd)

Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor [1999] 5 MLJ 222 (distd)

Local Government Board v Arlidge [1915] AC 120 (refd)

Legislation referred to

Federal Constitution art 135(1)(d), (2)

Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 regs 6, (2)(c), (6)

Service Commissions Act 1957 s 3

Karpal Singh (*M Manoharan* with him) (*Karpal Singh & Co*) for the plaintiff.

Amarjeet Singh (Attorney General's Chambers) for the defendants.

Cur Adv Vult

Kamalanathan Ratnam J:

FACTS

The plaintiff until his dismissal, was a Police Constable in the Royal Malaysian Police Force. He was called upon to attend orderly room proceedings on 7 June 1990 to answer four charges under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations').

THE FOUR CHARGES

First charge

> Bahawa anda pada 22 Ogos 1989 lebih kurang jam 8.30 pagi di bilik No 5, Hotel Golden City, Jalan Sulaiman, Mersing dalam daerah Mersing di Negeri Johor didapati telah berkelakuan dengan cara tidak senonoh dan mencemarkan nama baik Pasukan iaitu telah bergaduh dengan isteri anda bernama Latifah bte Khamis. Oleh yang demikian anda telah melakukan kesalahan tatatertib di bawah Jadual 2(12) Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970 dan boleh dihukum di bawah peraturan 2 Peraturan-Peraturan yang sama.

Second charge

> Bahawa anda pada 22 Ogos 1989 lebih kurang jam 8.30 pagi di bilik No 5, Hotel Golden City, Jalan Sulaiman, Mersing dalam daerah Mersing di Negeri Johor, anda didapati telah berdua-duaan dengan seorang wanita yang bukan mukhrim bernama Nafisah bte Abd Kadir. Oleh yang demikian anda telah melakukan kesalahan tatatertib iaitu berkelakuan tidak senonoh dan mencemarkan nama baik Pasukan di bawah Jadual 2(12) Peraturan-

Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970 dan boleh dihukum di bawah peraturan 2 Peraturan-Peraturan yang sama.

Third charge

Bahawa anda pada 22 Oktober 1989 lebih kurang jam 9.30 pagi di pejabat IPDP Mersing dalam daerah Mersing di Negeri Johor, telah bercakap bohong dalam satu siasatan rasmi rujukan Mersing LMAF No 59/89 iaitu anda telah membuat pengakuan berkahwin kali kedua dengan seorang wanita bernama Nafisah bte Abd Kadir. Oleh yang demikian anda telah melakukan kesalahan tatatertib di bawah Jadual 2(52) Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970 dan boleh dihukum di bawah peraturan 2 Peraturan-Peraturan yang sama.

Fourth charge

Bahawa anda pada 22 Oktober 1989 lebih kurang jam 9.30 pagi di pejabat IPDP Mersing dalam daerah Mersing di Negeri Johor, telah membuat pengakuan di hadapan Insp Abd Nasir Othman bahawa anda telah berkahwin kali kedua dengan seorang wanita rakyat Thailand bernama Nafisah bte Abd Kadir tanpa kebenaran Jabatan. Oleh yang demikian anda telah melakukan kesalahan tatatertib dengan sengaja tidak menurut perintah yang sah di bawah Jadual 2(7) Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970 dan boleh dihukum di bawah peraturan 2 Peraturan-Peraturan yang sama.

As a result, the plaintiff was dismissed.

THE CLAIM

The plaintiff has in his statement of claim prayed for a declaration that his dismissal was unlawful and that he be held still to be in service, that an account be taken of all the salaries, allowances and emoluments due to him from the date of his dismissal and that the same be paid to him, that he be reinstated in service without any loss in rank or loss of opportunity for promotion. He also asked for damages to be assessed by the senior assistant registrar with interest and costs.

FINDINGS OF THE COURT

From the evidence I find that in actual fact only 3 charges were proceeded with against the plaintiff on 7 June 1990, namely charges (a), (b) and (c). The fourth charge under (d) was not proceeded with.

I agree with the submission of Mr Amarjeet Singh that since the plaintiff is only seeking a declaration against his dismissal and consequential damages, as such the first charge and its outcome is irrelevant and that I need not consider the same since the punishment meted out for the first charge was 'severe reprimand'. Just for record purposes, he claimed trial to this charge and was found guilty.

It is clear that the plaintiff claimed trial to the second and the fourth charges and pleaded guilty to the third charges. However, it is the plaintiff's case that the 4th charge was withdrawn on the day of enquiry.

Non-supply of notes of proceedings

The plaintiff complained that he had applied for the notes of the proceedings of the enquiry but was refused the same by the officer conducting the enquiry on the basis that 'such notes are not a document to which the public have a right of access under any written law, or otherwise'. Section 3 of the Service Commissions Act 1957 ('the Act') reads:

> No person shall in any legal proceedings be permitted or compelled to produce or disclose any communication written or oral which has taken place between a Commission or any member of the Commission and the Government or any Minister or public officer or any communication between members of a Commission in exercise of or in connection with the exercise of the functions of the Commission unless the Yang di-Pertuan Agong shall in writing consent to such production or disclosure.

My learned brother Augustine Paul JC (as he then was) has held in *Ganesan a/l Singaram v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1998] 1 MLJ 240 that s 3 of the Act does not apply to a request for the notes of evidence of the disciplinary enquiry because the said section refers to a communication between a commission and any of the named persons in the said section and does not refer to the proceedings at a disciplinary tribunal which is in fact in the nature of a hearing. I agree. It is also my judgment that what went on during the proceedings of the enquiry cannot amount to 'communication' within the meaning of s 3 of the Act.

However, in this case the plaintiff clearly fell far short of expressing his legal right to the notes of proceedings of the enquiry. All that the plaintiff did is to write a letter and to send 2 reminders. Once the defendants refused the notes pursuant to s 3 of the Act, the plaintiff in this case ought to have taken out a summons to seek discovery and to inspect the notes of evidence of the disciplinary proceedings. By his failure to proceed to exercise his full judicial right the plaintiff here failed to do what was done by the plaintiff in *Ganesan a/l Singaram.*

However, should the plaintiff be penalised for failing to pursue with the application for discovery or for inspection? I do not think so. Since I have held that s 3 of the act does not protect the defendants and since the plaintiff had already asked for the said notes and had been refused, it is my judgment that the non-supplying of the notes has prejudiced the plaintiff. To illustrate, the plaintiff said in evidence that at the conclusion of the enquiry on 7 June 1990 he was told that he was dismissed from service. But he was not told of the decision of each of the charges. This was not challenged. However, even if he was challenged on this, the truth or falsity of such a contention could have been easily ascertained by this court from the notes of evidence which would have been included in the Common Agreed and Admitted Bundle of Documents (CABD). It is my judgment therefore that the non-supplying of the notes of proceedings goes to the validity of the decision making process of the orderly room proceedings against the plaintiff held on 7 June 1990.

Failing to record the finding of guilt

The regulation relating to this issue is governed by reg 6 which reads as follows:

> 6 (1) The charge shall be read out to the officer by the adjudicating authority and if necessary explained to him. He shall then be called upon to plead to the charge.
>
> (2) If the officer pleads guilty —
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> (a) the adjudicating authority shall record briefly the facts in support of the charge and shall explain them to the officer. The facts will be obtained by questioning any officer or witness who has knowledge of the facts, or if the adjudicating authority has been supplied with any documents containing the facts of the charge, by reference to such documents;
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> (b) the officer shall then be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded, or if he has nothing to say, such fact shall be recorded;
>
> (c) the adjudicating authority shall then record a finding of guilt and award a punishment in respect of the offence.
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> ...
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> (6) The adjudicating authority shall record its finding on the evidence. If the finding is one of guilty, the officer shall be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded, or if he has nothing to say, that fact shall be recorded.

To my mind these regulations, especially regs 6(2)(c) and 6(6), are mandatory provisions which require the adjudicating authority to record its findings and that if the finding is one of guilty the officer can then plead in mitigation.

I reject the defendants' argument that the failure to record the finding of guilt is merely an irregularity. This failure to record such an important factor in the proceedings clearly affects the validity of the decision making process of the proceedings. Whilst it is easy to assume as suggested by Mr Amarjeet Singh for the defendants that since the plaintiff was given an opportunity to plead in mitigation the non-recording of the finding of guilt is merely directory as being purely procedural and does not give the plaintiff a legal right of redress in a Court of law, such an assumption falls foul of art 135(2) of the Federal Constitution which reads as follows:

> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this Clause shall not apply to the following cases:
>
> (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or
>
> (b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this Clause; or

(c) where the Yang di-Pertuan Agong, or, in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this Clause; or

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:

Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

By virtue of art 132(1)(d) the police fall within the meaning of 'service' referred to in art 135(2). To my mind the key words in art 135(2) are 'without being given a reasonable opportunity of being heard'. It is clear that pursuant to reg 6(6) the adjudicating authority has to record its findings in relation to each charge upon the evidence presented. The failure to record the finding of guilt means that it is possible the plaintiff might not have been told that he had been found guilty because only after the recording of the finding of guilt should the officer be invited to mitigate. The mitigation therefore was not in accordance with the provision of reg 6(6) and this clearly has affected the validity of the decision making process.

In *Harbhajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor* [1999] 5 MLJ 222, my learned brother James Foong J held that although the plaintiff was not informed on which of the three charges he was dismissed, there were no provisions in the general orders of the Public Officer (Conduct and Discipline) regulations 1993 to insist on such disclosure. The judiciary, he said, must not impose its own methods on administrative or executive officers, as to do so would be an usurpation (see Lord Shaw of Dunfermline in *Local Government Board v Arlidge* [1915] AC 120.) However in the case before me both regs 6(2)(c) and 6(6) require the recording of a finding of guilt.

In all the circumstances, I am therefore inclined to grant the plaintiff an order in terms of his claim as summarised by me in this judgment.

Application allowed.

Reported by Benjamin Yong